



## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

[Docket No.: PTO-C-2023-0020]

### Formal Tribal Consultation on WIPO IGC Negotiations

**AGENCY:** United States Patent and Trademark Office, Department of Commerce.

**ACTION:** Notice of Tribal Consultation meetings and request for comments.

**SUMMARY:** The United States Patent and Trademark Office (USPTO), Department of Commerce, announces a formal Tribal Consultation, and requests written comments on issues involving genetic resources (GR), traditional knowledge (TK), and traditional cultural expressions (TCEs). These topics are being discussed at the World Intellectual Property Organization (WIPO). Specifically, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (traditional cultural expressions) (WIPO IGC) is undertaking negotiations regarding how best to protect GR, TK, and TCEs of Indigenous Peoples.

**DATES:** *Webinar Dates:* The webinar for federally recognized Tribal Nations and their proxies will be held on Tuesday, January 16, 2024, from 3 to 5 p.m. ET and Wednesday, January 17, 2024 from 3 to 5 p.m. ET. The webinar for state recognized Tribes and other Tribal members, Native Hawaiians and their representatives, and inter-tribal organizations, will be held on Friday, January 19, 2024, from 3 to 5 p.m. ET and Tuesday, January 23, 2024, from 3 to 5 p.m. ET. Please register in advance to participate in one of these webinars at: <https://cvent.me/bZRP3L>. After registering, you will receive a confirmation email containing information about joining the meeting. If you are unable to join via the platform, a call-in number also will be provided. The webinar for federally recognized Tribes is open only to federally recognized Tribal Nations and their proxies and is closed to the press. The webinar for state recognized Tribes and other Tribal

members, Native Hawaiians and their representatives, and inter-tribal organizations is open only to these entities and communities and is also closed to the press.

*Comment Deadline:* Written comments pursuant to the questions in this Notice must be received by Friday, February 23, 2024.

**ADDRESSES:** Written comments may be submitted by email to:

TribalConsultWIPOIGC2023@uspto.gov. Please use the heading “WIPO IGC FORMAL TRIBAL CONSULTATION 2023” in the subject line.

If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please submit comments by First-Class Mail or Priority Mail to:

Susan Anthony, Tribal Affairs Liaison, Mail Stop OPIA, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22314-1450.

**FOR FURTHER INFORMATION CONTACT:** Susan Anthony, Tribal Affairs

Liaison, Office of Policy and International Affairs (OPIA), USPTO, at

Susan.Anthony@uspto.gov or at 571-272-8459. Please direct media inquiries to the

USPTO’s Office of the Chief Communications Officer at 571-272-8400. These webinars are closed to the media.

**SUPPLEMENTARY INFORMATION:** The USPTO has been actively engaged in discussions in the WIPO IGC, along with other Federal agencies, and has been

responsible for leading the development of U.S. positions on WIPO IGC issues. The

USPTO’s announcement for formal Tribal Consultation on WIPO IGC issues aligns with the Federal Government’s policies and relationship with Tribal Governments, including:

Executive Order 13175;<sup>1</sup> President Biden’s Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships;<sup>2</sup> President Biden’s Memorandum on

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<sup>1</sup> [www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-Indian-tribal-governments/](http://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-Indian-tribal-governments/).

<sup>2</sup> [www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/](http://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/).

Uniform Standards for Tribal Consultation;<sup>3</sup> and the Tribal Consultation and Coordination Policy for the U.S. Department of Commerce (“Policy”).<sup>4</sup> The Policy requires that the Department and operating units engage in meaningful dialogue with Tribes regarding policies that have Tribal implications. This Tribal Consultation will consist of a webinar for federally recognized Tribal Nations and their proxies and a separate webinar for state recognized Tribes and other Tribal members, Native Hawaiians, and inter-tribal associations.

In addition to these webinars, the USPTO seeks written comments regarding the questions in this Notice. Written comments may include comments responsive to the questions in this Notice, comments responsive to issues discussed during the webinars, and any other related concerns.

WIPO is a specialized United Nations agency based in Geneva, Switzerland, that focuses on intellectual property (IP). Established in September 2000, the WIPO IGC serves as a forum where WIPO Member States<sup>5</sup> and accredited observers can discuss the intellectual property issues that arise in the context of access to GR and benefit-sharing, as well as the protection of TK and folklore/TCEs.

Since 2009, the WIPO IGC has been engaged in text-based negotiations on an international legal instrument for GR, TK, and TCEs. The U.S. understands the term “international legal instrument(s)” in the WIPO IGC mandate<sup>6</sup> to include declarations, recommendations, best practices, toolkits, and other forms of “soft law” and actively

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<sup>3</sup> [www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/](https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/).

<sup>4</sup> [www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf](https://www.commerce.gov/sites/default/files/media/files/2013/tribal-consultation-final.pdf).

<sup>5</sup> WIPO currently has 193 Member States: [www.wipo.int/members/en/](https://www.wipo.int/members/en/).

<sup>6</sup> The current “IGC Mandate” may be found at: [www.wipo.int/tk/en/igc](https://www.wipo.int/tk/en/igc). As of this writing, the IGC Mandate covers the biennium 2024/2025.

seeks practical recommendations in addressing the matters under discussion within the WIPO IGC. WIPO also has the authority to initiate norm-setting discussions and to propose international rules for adoption by a diplomatic conference or adoption by another WIPO body. “International legal instrument(s)” could also include a treaty or international agreement, although there is no requirement that prescribes this particular outcome. This request for comments seeks Tribal input on, among other topics, whether a treaty or forms of soft law are necessary to address issues regarding TK and TCEs.

The WIPO General Assembly, held in Geneva, Switzerland, on July 14-22, 2022, decided to convene a diplomatic conference to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, based on document WIPO/GRTKF/IC/43/5 (the Chair’s text) and any other contributions by Member States. The diplomatic conference is to be held no later than 2024.<sup>7</sup> In September 2023, a special session of the IGC was held to close certain existing gaps in the text to the extent possible. The special session of the IGC was able to agree on only minor changes to the original Chair’s text. Also in September 2023, a Preparatory Committee of the Diplomatic Conference convened and adopted rules of procedure for the diplomatic conference.<sup>8</sup> Tribes also may wish to review the USPTO Federal Register Notice on WIPO IGC Negotiations on Genetic Resources and associated Traditional Knowledge.

In July 2023, the WIPO General Assembly also decided to continue the WIPO IGC text-based negotiations on IP and the protection of TK and TCEs in the 2024-2025 biennium. Under its current mandate, the WIPO IGC meets three times per year, with each meeting typically lasting for one week, at the WIPO headquarters in Geneva,

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<sup>7</sup> The WIPO Press Release can be found at: [www.wipo.int/diplomatic-conferences/en/genetic-resources/index.html](http://www.wipo.int/diplomatic-conferences/en/genetic-resources/index.html).

<sup>8</sup> Id.

Switzerland.<sup>9</sup> Participants are WIPO Member States<sup>10</sup> and various accredited Observers.<sup>11</sup> The USPTO, in consultation with other Federal agencies,<sup>12</sup> has been leading the development of United States positions on issues before the WIPO IGC. This request for comments seeks Tribal input to inform the U.S. Government as it participates in the ongoing WIPO IGC meetings on TK/TCEs and in meetings related to the anticipated diplomatic conference in 2024 on GR and associated TK.

On June 28, 2022, the USPTO hosted a webinar providing background information on the WIPO IGC text-based negotiations to assist American Indians, Alaska Natives, and Native Hawaiians and their representatives in preparing for this Tribal Consultation. The webinar outlined the Federal Government's positions on issues involving IP and GR, TK, and TCEs, and opportunities for Tribal input with respect to the WIPO IGC and with the Federal Government. Links to this webinar and to WIPO IGC resources mentioned in the webinar can be found under "Resources" below.

*Definitions.* While "Genetic Resources" is defined in the Convention on Biological Diversity (CBD) as "genetic material of actual or potential value" and "genetic material" is defined as "any material of plant, animal, microbial or other origin

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<sup>9</sup> The IGC resumed its negotiations in a hybrid format after a pause of two years caused by the COVID-19 pandemic, at the 42<sup>nd</sup> session, February 28 to March 4, 2022.

<sup>10</sup> See Member States at: [www.wipo.int/members/en/](http://www.wipo.int/members/en/).

<sup>11</sup> See Participating in the IGC at: [www.wipo.int/tk/en/igc/participation.html](http://www.wipo.int/tk/en/igc/participation.html). The Observers include Indigenous Peoples and local communities throughout the world. Among the Tribal Nations, the Tulalip Tribes of Washington, through its Governmental Affairs Department, is an accredited organization able to participate in person or virtually both orally and, through the Secretariat, in writing. Funding for Indigenous Peoples and local communities to participate in person may be available through the WIPO Voluntary Fund, upon timely application.

<sup>12</sup> These Federal agencies typically include the American Folklife Center at the Library of Congress, the International Trade Administration, the U.S. Department of Commerce, the U.S. Copyright Office, the U.S. Department of the Interior, and the U.S. Department of State.

containing functional units of heredity,”<sup>13</sup> the term GR has not been given an agreed upon definition in the WIPO IGC. Definitions of TK and TCEs are not the subject of international agreement and remain under discussion in the WIPO IGC. For purposes of providing supplementary information only, possible attributes of TK might include, but are not limited to, knowledge that is passed from generation to generation, in fixed or unfixed form, and linked with the national or social identity of Indigenous Peoples and local communities. TK might include know-how, skills, innovations, practices, teachings, and learning. Attributes of TCEs might include, but are not limited to, subject matter that is passed from generation to generation, usually in unfixed form but not necessarily, based on community-oriented creativity and generally not attributable to individual authors, and continuously used and developed within the community. TCEs might take the forms of literature, music, dance, games, mythology, rituals, and handicrafts. TCEs may also encompass religious and sacred texts, arts and customs, other expressions of faith, and ancient beliefs. Some forms of TCEs may be considered secret or sacred, while others may be routinely used commercially.

The issue of “public domain” is a fundamental concept in the WIPO IGC TCEs and TK discussions, defining the boundary between the interests of holders of exclusive rights and the ability of others, including the public, to access and use the subject matter to be protected. Each type of intellectual property - patent, trade secret, trademark, and copyright - recognizes a form of public domain. Various approaches to defining the public domain have been considered in the WIPO IGC, including in WIPO IGC 40: “Public domain refers for the purposes of this instrument to tangible and intangible materials that by their nature are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the

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<sup>13</sup> See Article 2 in Home | Convention on Biological Diversity at: [www.cbd.int](http://www.cbd.int). The U.S. is not a member of the CBD, but accepts these definitions for purposes of the work in the WIPO IGC.

use of such material is carried out.” Indigenous Peoples within the WIPO IGC have expressed concern that defining the public domain is not susceptible to a uniform dividing line between protected and unprotected elements and must be more elastic. While WIPO IGC Member States generally have familiarity with the concept of public domain in intellectual property, they may not have experience in creating exclusive rights around TK or TCEs. Thus, taking TK or TCEs out of the public domain remains a principal issue of discussion within the WIPO IGC.

*Request for information:* While the USPTO welcomes any relevant comments on the topics described in this Request for Comments, the USPTO is particularly interested in comments responsive to the questions below. A non-exclusive list of WIPO IGC resources on the WIPO website - [WIPO.int](http://WIPO.int) - and the USPTO website - [USPTO.gov](http://USPTO.gov) - follows the questions below and may provide useful background information in considering these questions. When responding to the questions, please identify yourself and either your Tribal Government or that you are a Native Hawaiian. If you are a Tribal or Native Hawaiian representative, please identify yourself, whom you represent, and your involvement to date, if any, in the WIPO IGC in person or virtually. Commenters need not respond to every question and may provide relevant information, even if not responsive to a particular question. For purposes of the Questions for Comment below, please note that “Tribe” is intended to refer to Tribal Nations, state recognized Tribes, other Tribes, and Native Hawaiians.

### **Questions for Comment**

1. Please describe how Tribes protect genetic resources, traditional knowledge, and/or traditional cultural expressions.
2. Please describe your views on using the framework of intellectual property concepts and laws, such as patents, trademarks, copyrights, or trade secrets, to

protect genetic resources, traditional knowledge, and/or traditional cultural expressions.

3. Please describe your views regarding using any other means to protect genetic resources, traditional knowledge, and/or traditional cultural expressions. Please also include your views regarding:
  - a. whether eligibility criteria should be used to determine which types of traditional knowledge, traditional cultural expressions, and/or genetic resources would be protected and, if so, what criteria should be used, and
  - b. what parameters, if any, should be placed on the scope or term of protection for traditional knowledge, traditional cultural expressions, and/or genetic resources.
4. Please describe your views regarding whether an international treaty should be pursued to protect genetic resources, traditional knowledge and/or traditional cultural expressions. If so, please describe your views on what essential elements or conditions would be necessary to include in an international treaty to ensure protection of genetic resources, traditional knowledge and/or traditional cultural expressions.
5. The WIPO IGC has not come to any conclusions about how to define “traditional knowledge.” Please describe how you would recommend defining “traditional knowledge” or, alternatively, please provide your views regarding the attributes of traditional knowledge.
6. The WIPO IGC has not come to any conclusions about how to define “traditional cultural expressions.” Please describe how you would recommend defining “traditional cultural expressions” or, alternatively, please provide your views regarding the attributes of traditional cultural expressions.



7. The WIPO IGC has not come to any conclusions about how to define “public domain.”
  - a. Please describe how you would recommend defining “public domain.”
  - b. Please share your views regarding how the concept of “public domain” relates to genetic resources, traditional knowledge, and/or traditional cultural expressions.
8. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public are capable of protection, whether they should be protected, and, if so, how they should be protected, including any specific examples you may have. Please also share your views on whether there should be any exceptions to such protection.
9. Please share your views regarding whether genetic resources, traditional knowledge, and/or traditional cultural expressions that have been widely diffused to the public can continue to impact holders and, if so, please share any specific examples you may have.
10. Please describe your recommendations, if any, on how to identify traditional knowledge that has entered the public domain and, therefore, may be freely used by others.
11. Please describe your recommendations, if any, on how to identify traditional cultural expressions that have entered the public domain and, therefore, may be freely used by others.
12. Please describe your recommendations, if any, on how to identify genetic resources that have entered the public domain and, therefore may be freely used by others.

13. Please describe the circumstances, if any, in which a holder of a traditional cultural expression, genetic resource, and/or traditional knowledge might be interested in permitting third party use. Please include your views regarding:
- a. what conditions or requirements a holder might place on third parties in exchange for granting permission for such use;
  - b. how a third party, interested in potential use, could determine whether something is a traditional cultural expression, genetic resource, or traditional knowledge, and who holds it; and
  - c. who, with respect to the holder of a traditional cultural expression, genetic resource, or traditional knowledge, would be the appropriate authority to control, or grant permission for, such third-party use.
14. Please describe real-world examples, if any, in which a Tribe has authorized others to commercially use its traditional cultural expressions, genetic resources, or traditional knowledge.
15. Please describe your views and any recommendations, including any real-world examples, regarding the use by third parties of genetic resources, traditional knowledge, and/or traditional cultural expressions for research.
16. Please describe your views and any recommendations, including any real-world examples, regarding the use of genetic resources, traditional knowledge, and/or traditional cultural expressions by archives, libraries, museums, or cultural institutions.
17. Please describe your views regarding how the unauthorized use of traditional knowledge, traditional cultural expressions, and/or genetic resources impacts Tribes, including any real-world examples.

18. Please provide your recommendations, including any real-world examples, regarding how best to address unauthorized uses of genetic resources, traditional knowledge, and/or traditional cultural expressions.

### **Resources**

Below is a non-exclusive list of WIPO IGC resources on the World Intellectual Property Organization website, WIPO.int, that may be useful in answering the above questions. In addition, the USPTO hosted a webinar on June 28, 2022, providing information about the WIPO IGC text-based negotiations to assist American Indians, Alaska Natives, and Native Hawaiians in preparing for this Tribal Consultation. A recording of the webinar can be found here: <https://www.uspto.gov/ip-policy/patent-policy/uspto-formal-tribal-consultation-preview>. The USPTO.gov website also contains information about intellectual property, including “IP eLearning modules” on intellectual property protection and enforcement.

**Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, dated February 26, 2023**, can be found here:

[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=601231](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=601231).

**Documents for the WIPO IGC meeting on June 5 - 9, 2023, including the latest traditional knowledge (TK) and traditional cultural expressions (TCEs) texts**, can be found here: [www.wipo.int/meetings/en/details.jsp?meeting\\_id=75419](http://www.wipo.int/meetings/en/details.jsp?meeting_id=75419).

**IGC 47 Summary** can be found here:

[www.wipo.int/tk/en/news/igc/2023/news\\_0005.html](http://www.wipo.int/tk/en/news/igc/2023/news_0005.html).

**The Non-paper Chair’s Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions:**

**The First Draft, dated February 21, 2023**, can be found here:

[www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=600911](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=600911).

**The Second Draft, dated May 26, 2023**, can be found here:

[www.wipo.int/meetings/en/details.jsp?meeting\\_id=75419](http://www.wipo.int/meetings/en/details.jsp?meeting_id=75419).

**WIPO IGC Press Release: WIPO Member States Approve Diplomatic Conferences for Two Proposed Accords, dated July 21, 2022**, can be found here:

[www.wipo.int/pressroom/en/articles/2022/article\\_0009.html](http://www.wipo.int/pressroom/en/articles/2022/article_0009.html).

**Text associated with the announcement of the Diplomatic Conference on Intellectual Property and Genetic Resources:** “Substantive articles” (Articles 1 through 9) from WIPO/GRTKF/IC/43/5 Chair’s Text of a Draft International Legal Instrument relating to Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Forty-Third Session (wipo.int), as revised in the Special Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, September 4-8, 2023, is included as the Annex to document WIPO/GRTKF/IC/SS/GE/23/4 on the Decisions adopted by the Committee on genetic resources and associated traditional knowledge, and can be found here:

[www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=620066](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=620066).

**General Information on the Diplomatic Conference on Intellectual Property and Genetic Resources** can be found here: [www.wipo.int/diplomatic-conferences/en/genetic-resources/index.html](http://www.wipo.int/diplomatic-conferences/en/genetic-resources/index.html).

**Note** that documents for all WIPO IGC meetings can be found here:

[www.wipo.int/meetings/en/topic.jsp?group\\_id=110&items=10](http://www.wipo.int/meetings/en/topic.jsp?group_id=110&items=10).

**WIPO Publication: Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions** can be found here:

[www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_933\\_2020.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf).

**WIPO Publication: Protect and Promote Your Culture A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities** can be found here: [www.wipo.int/publications/en/details.jsp?id=4195](http://www.wipo.int/publications/en/details.jsp?id=4195).

**WIPO Webinar Series: How to Protect and Promote Your Culture** can be found here: [www.wipo.int/tk/en/protect\\_and\\_promote.html](http://www.wipo.int/tk/en/protect_and_promote.html). These webinars focus on intellectual property (IP) tools that can be used to protect and promote traditional knowledge (TK) and traditional cultural expressions (TCEs).

**Documents describing key issues related to protecting traditional cultural expressions (TCE)/folklore and traditional knowledge (TK)** can be found here: [www.wipo.int/tk/en/igc/issues.html](http://www.wipo.int/tk/en/igc/issues.html).

**Presentations on Indigenous and Local Community Experiences** can be found here: [www.wipo.int/tk/en/igc/panels.html](http://www.wipo.int/tk/en/igc/panels.html). See also Indigenous Peoples and Local Communities' Engagement: [www.wipo.int/tk/en/engagement.html](http://www.wipo.int/tk/en/engagement.html).

**IGC Related Seminars, on intellectual property and genetic resources, on IP and traditional knowledge, and on IP and traditional cultural expressions** can be found here: [www.wipo.int/tk/en/igc/related\\_seminars.html](http://www.wipo.int/tk/en/igc/related_seminars.html).

**Views from Speakers at the Seminar on Intellectual Property and Traditional Cultural Expressions, on June 8 and 9, 2017**, can be found here: [www.wipo.int/tk/en/news/tk/2017/news\\_0009.html](http://www.wipo.int/tk/en/news/tk/2017/news_0009.html).

**P. Jaszi, "Protecting traditional cultural expressions – some questions for lawmakers," WIPO Magazine, dated August 2017**, can be found here: [www.wipo.int/export/sites/www/wipo\\_magazine/en/pdf/2017/wipo\\_pub\\_121\\_2017\\_04.pdf](http://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2017/wipo_pub_121_2017_04.pdf).

**Information on how to participate in the IGC, including virtually**, can be found here: [www.wipo.int/tk/en/igc/participation.html](http://www.wipo.int/tk/en/igc/participation.html). Note that organizations requesting to be

accredited as an observer at the IGC must complete an accreditation form and submit it to WIPO at least 60 days prior to the first session that it wishes to attend.

**Katherine K. Vidal,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

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